

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CRELENCIO CHAVEZ and JOSE)	Case No. CV-09-4812 SC
ZALDIVAR, on behalf of all others)	
similarly situated,)	ORDER GRANTING IN PART AND
)	DENYING IN PART PLAINTIFF'S
Plaintiffs,)	MOTION FOR ORDER ADOPTING
)	<u>PROPOSED CLASS NOTICE</u>
v.)	
)	
LUMBER LIQUIDATORS, INC., and DOES)	
1 through 20, inclusive,)	
)	
Defendants.)	
)	

I. INTRODUCTION

Plaintiff Jose Zaldivar ("Plaintiff") brings this action against Defendant Lumber Liquidators, Inc. ("LLI") for failure to pay overtime wages, failure to provide meal breaks, failure to pay vested vacation wages, and failure to reimburse work-related expenses. ECF No. 20 (Second Amended Complaint ("SAC")). On March 26, 2012, the Court certified Plaintiff's proposed unpaid overtime class, which is defined as:

[A]ll past and current retail store employees of [LLI] classified by [LLI] as non-exempt employees . . . and employed in California from September 3, 2005 through the present, who were paid overtime wages and were also paid commission wages and/or other non-discretionary pay or bonuses.

1 ECF No. 92 ("Class Cert. Order"). Plaintiff now moves for the
2 Court to adopt his proposed class notice. ECF No. 96 ("Mot.").
3 The Motion is fully briefed, ECF Nos. 98 ("Opp'n"), 100 ("Reply"),
4 and appropriate for determination without oral argument. For the
5 reasons set forth herein, the Motion is GRANTED in part and DENIED
6 in part.

7
8 **II. DISCUSSION**

9 LLI objects to Plaintiff's proposed class notice on seven
10 grounds. The Court reviews each of these objections below.

11 **A. Posting Notice at LLI Stores**

12 Plaintiff proposes that a third-party claims administrator
13 mail the class notice to each class member. The claims
14 administrator would obtain the addresses from LLI. Plaintiff also
15 proposes that LLI post the notice "in each California store and
16 facility of [LLI] in a prominent location readily accessible to all
17 potential class action members employed there." Mot. at i. LLI
18 objects, arguing that posting the notice at LLI stores is overly
19 intrusive and disruptive and that mailing alone is sufficient.
20 Opp. at 2. Plaintiff responds that mailing alone would be
21 insufficient since LLI may not have current addresses for many
22 class members, especially those who no longer work for LLI. Reply
23 at 1-2.

24 Pursuant to Federal Rule of Civil Procedure 23(c)(2)(B), "the
25 court must direct to class members the best notice that is
26 practicable under the circumstances, including individual notice to
27 all members who can be identified through reasonable effort." The
28 Court finds that posting the proposed notice in LLI stores is

unnecessary to provide class members with the best notice practicable. Plaintiff is primarily concerned about getting notice to former employees because LLI may not have accurate and up-to-date contact information for these class members. However, because they no longer work for LLI, these class members are unlikely to see notices posted in LLI stores. Further, since LLI likely has accurate and up-to-date contact information for its current employees, posted notices are unnecessary to reach them. While posting class notice in LLI stores may be inexpensive, it has the potential to disrupt work operations. Accordingly, LLI shall not be required to post the class notice in its stores.

B. Telephone Numbers

Plaintiff has also requested that LLI provide the claims administrator with class members' telephone numbers. Mot. at i. LLI objects on the grounds that this is unnecessary and creates the potential for an invasion of privacy. LLI's argument lacks merit. In the event that a class member changes her address but not her telephone number, a telephone call may be the only way to reach her. Further, LLI has offered no authority which would suggest that a telephone call from a third-party claims administrator would rise to the level of an invasion of privacy. Accordingly, to the extent that such information is available, LLI shall provide the claims administrator with the telephone numbers of all class members.

C. Labor Code Section 203

Plaintiff's proposed class notice would also notify class members that Plaintiff is seeking relief pursuant to California Labor Code Section 203. Plaintiff repeatedly indicated that he

1 would be seeking damages under Section 203 in the SAC. See, e.g.,
2 SAC ¶¶ 22, 28, 37. Section 203 provides: "If an employer willfully
3 fails to pay, without abatement or reduction, in accordance with
4 Sections 201, 201.3, 201.5, 202, and 205.5, any wages of an
5 employee who is discharged or who quits, the wages of the employee
6 shall continue as a penalty from the due date thereof at the same
7 rate" LLI objects to any reference to Section 203 in the
8 class notice on the ground that the Court has not certified a claim
9 for waiting periods under Section 203. Opp'n at 4.

10 LLI's objection is overruled. As Plaintiff argues, his claim
11 for compensation under Section 203 is merely a measure of damages
12 for wages not yet paid, not a separate class claim that needs to be
13 certified. LLI points to one case, Espinoza v. Domino's Pizza,
14 LLC, EDCV071601VAP, 2009 WL 882845 (C.D. Cal. Feb. 18, 2009), in
15 which a court certified a separate class under Section 203. Opp'n
16 at 4. However, in Espinoza, the court noted that the Section 203
17 class was "coextensive" with another class which brought claims for
18 missed meal periods and that "[the] [p]laintiffs offer[ed] the same
19 facts to support the Section 203 Class as those offered in support
20 of the proposed Meal Break Class." Espinoza, 2009 WL 882845, at
21 *1, *5. Likewise, in the instant action, Plaintiff's claims for
22 waiting time penalties under Section 203 are coextensive with his
23 wage claims. With respect to the unpaid overtime class, Plaintiff
24 claims that LLI failed to account for non-discretionary pay or
25 bonuses when calculating class members' overtime. Class Cert.
26 Order at 12. To the extent that Plaintiff can succeed on this
27 claim, certain class members may be entitled to additional
28 compensation under Section 203.

1 Further, LLI's objection appears to be procedurally improper.
2 LLI had the opportunity to challenge the Plaintiff's request for
3 Section 203 relief when Plaintiff moved for class certification.
4 LLI declined to do so. While Plaintiff did not move to certify a
5 class under Section 203, it was clear from the SAC that he intended
6 to seek Section 203 relief. The Court is reluctant to limit the
7 scope of the class's damages on a motion to approve class notice.
8 In any event, LLI has failed to enunciate why permitting Plaintiff
9 to seek waiting time penalties under Section 203 would be
10 inconsistent with the class certification requirements of Rule 23.

11 Accordingly, the Court overrules LLI's objection to the
12 references to California Labor Code Section 203 in Plaintiff's
13 proposed class notice.

14 **D. Class Period**

15 In granting Plaintiff's motion for class certification, the
16 Court defined the unpaid overtime class to include LLI non-exempt
17 employees who worked at LLI's California stores from "September 3,
18 2005 through the present." Class Cert. Order at 12-14. Consistent
19 with the Court's Order, Plaintiff seeks to notify a number of
20 persons who were employed at LLI from September 3, 2005 through the
21 present. Mot. at 1. LLI now argues that the class period should
22 be limited to March 1, 2007 through June 1, 2010. Opp'n at 5. LLI
23 asserts that, prior to March 1, 2007, bonuses and commissions paid
24 to non-exempt employees were entirely discretionary and, after June
25 1, 2010, LLI included all non-discretionary incentive pay in the
26 calculation of employees' pay. Id.

27 LLI is effectively asking the Court to partially decertify the
28 class on a motion to approve class notice. The Court declines to

do so. Under Rule 23, the Court may modify or decertify the class at any time prior to final judgment. Fed. R. Civ. P. 23(c)(1)(C). In determining whether certification remains proper, courts must apply the requirements of Rule 23. Weigele v. FedEx Ground Package Sys., Inc., 267 F.R.D. 614, 617 (S.D. Cal. 2010). The "moving party" bears the burden of showing that decertification is proper. Id. Here, LLI has not formally moved for decertification. Nor has it gone into any detail to explain why decertification would be proper under Rule 23. If LLI wishes to decertify or partially decertify the unpaid wage class, then it may file a motion. In the meantime, the class definition will remain unchanged.

E. Notice Period

LLI contends that any notice provided to class members should require a response not later than sixty days from the date of the mailing. Opp'n at 6. Plaintiff does not oppose a notice period of sixty days, Reply at 8, and LLI's request is consistent with applicable case law, see Luque v. AT & T Corp., C 09-05885 CRB, 2010 WL 4807088, at *7 (N.D. Cal. Nov. 19, 2010). Accordingly, the court approves a sixty-day notice period.

F. Website

Plaintiff proposes to create a website where class members can find the Class Certification Order, the SAC, and LLI's answer to the SAC, along with "any other documents agreed upon by the parties." Mot. at ii. LLI argues that a website is unnecessary. Opp'n at 7. LLI also requests that, if such a website is approved, access should be restricted by requiring class members to enter a unique, individual password. Id. LLI reasons that such measures are necessary to mitigate risks, including the copying and

1 forwarding of information from the website with commentary that
2 distorts the notice approved by the Court. Id.

3 LLI's objections to the proposed website are overruled. LLI's
4 own authority recognizes that "the use of a website [is] beneficial
5 as part of a class action notice." Krzesniak v. Cendant Corp., C
6 05-05156 MEJ, 2007 WL 4468678, *2 (N.D. Cal. Dec. 17, 2007).

7 Further, the password protections suggested by LLI are unnecessary
8 and counterproductive. LLI suggests that material posted to the
9 website could be forwarded with commentary that could distort the
10 notice approved by the court. Opp'n at 7. However, even without
11 access to the website, persons could forward misleading emails
12 about this litigation. Further, the documents that Plaintiff
13 proposes to post to the website -- the pleadings and Court orders -
14 - are already publicly available in electronic format and, thus,
15 amenable to distortion. Perhaps the best defense against the
16 dissemination of misleading information about this litigation is to
17 make the notice and other court documents readily available to the
18 class. Restricting access to the proposed website by requiring
19 passwords which could be easily lost or forgotten would only
20 undermine the Court's goal of providing the best notice
21 practicable.

22 **G. Counsel's Contact Information**

23 LLI also argues that, as a matter of basic fairness, its
24 counsel's contact information should be included on the notice.
25 LLI suggests adding the following language to the notice: "You may
26 also contact counsel for [LLI] for information about the lawsuit."
27 The Court finds that including such information may lead to undue
28 confusion. Defense counsel's "[u]nsupervised, unilateral

1 communications with the plaintiff class" has the potential to
2 "sabotage the goal of informed consent by urging exclusion on the
3 basis of a one-sided presentation of the facts, without opportunity
4 for rebuttal." Kleiner v. First Nat. Bank of Atlanta, 751 F.2d
5 1193, 1203 (11th Cir. 1985). Further, it is unclear what
6 information defense counsel could provide that could not be
7 provided by Plaintiff's counsel. Accordingly, the Court denies
8 LLI's request to include its counsel's contact information in the
9 notice. See also Gambo v. Lucent Techs., Inc., 05 C 3701, 2005 WL
10 3542485 (N.D. Ill. Dec. 22, 2005) (finding there was "no basis in
11 law or logic" for defendant's request to include defense counsel's
12 name and contact information in the notice).

13
14 **III. CONCLUSION**

15 For the foregoing reasons, the Court GRANTS in part and DENIES
16 in part Plaintiff Jose Zaldivar's motion for an order adopting
17 Plaintiff's proposed class notice. The Court ADOPTS Plaintiff's
18 proposed notice with the following modifications: (1) LLI shall not
19 be required to post the notice at its stores; (2) notice provided
20 to class members should require a response not later than sixty
21 days from the date of the mailing of the notice.

22
23 IT IS SO ORDERED.

24
25 Dated: December 7, 2012

26 
27 UNITED STATES DISTRICT JUDGE
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